(3)

Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-882

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE E. BARNES,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THOMAS M. HAAS and
CHRISTOPHER KNIGHT
255 SAINT FRANCIS ST.
MOBILE, AL. 36602
(205)432-0457
ATTORNEYS FOR THE
PETITIONER

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT I	1
ARGUMENT II	7
CERTIFICATE OF SERVICE . . .	9

TABLE OF AUTHORITIES

CASES	PAGE
Brown v. Illinois, 422 U.S. 590 (1975)	1,2,3
Lanier v. South Carolina, 474 U.S. 25 (1985)	5
Miranda v. Arizona, 384 U.S. 436 (1966)	1,2,3,5
Opper v. United States, 348 U.S. 84 (1954)	7
Rawlings v. Kentucky, 448 U.S. 98 (1980)	1,2,3,4
Smith v. United States, 348 U.S. 147 (1954)	7
United States v. Frady, 456 U.S. 152 (1982)	6
Wong Sun v. United States, 371 U.S. at 486 (1963)	3

CONSTITUTIONAL AUTHORITY

U.S. CONST. Amend. IV	2,3,5
U.S. CONST. Amend. V	2,5

ARGUMENT

I.

REPLY TO PARAGRAPH 2 OF THE GOVERNMENT'S MEMORANDUM IN OPPOSITION.

The Government argues that the Miranda[1] warning given to the Petitioner after his illegal detention by the police was sufficient to attenuate the taint of the detention, relying on Rawlings v. Kentucky, 448 U.S. 98 (1980). Rawlings and Brown v. Illinois, 422 U.S. 590 (1975) instruct that Miranda warnings are an important factor in determining whether a confession is obtained by exploitation of an illegal arrest, but not dispositive. Other factors to be considered are temporal proximity of the arrest and the

---

1/ Miranda v. Arizona, 384 U.S. 436 (1966).

confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct, voluntariness being a threshold requirement.[2]

In Brown, the Court rejected establishment of a per se rule that Miranda warnings, in and of themselves, broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as the statement was found to be voluntary. The Court recognized that even if the statements were found to be voluntary under the Fifth Amendment, the Fourth Amendment issues remained so that

---

[2/] Rawlings v. Kentucky, 448 U.S. at 107 (1980), citing Brown v. Illinois, 422 U.S. at 603-604 (1975).

a voluntary statement must, nevertheless, be "sufficiently an act of free will to purge the primary taint" in light of distinct policies and interests of the Fourth Amendment. Brown v. Illinois, 422 U.S. at 598-599, citing Wong Sun v. United States, 371 U.S. at 486 (1963).

The facts in Rawlings are demonstrably distinguishable from those in the instant case. In Rawlings after an illegal detention which lasted approximately 45 minutes, during which detention the police sought a search warrant, the police gave the Defendant his Miranda warning, and the Defendant claimed ownership of the contraband after an officer's command "to take what was his."

After the agent gave Barnes his Miranda warning, Barnes, according to Carter, made the statement, "I know you

can smell the marijuana because I do." Barnes disputed making this statement. (Pet., p. A-7). Carter claims to having smelled marijuana before this occurred. (Pet., p. A-6).

The Rawlings scenario involved the obtaining of a search warrant by the police, which is not the case here. Moreover, the detention in Rawlings was characterized by a "congenial atmosphere" in the house, and the Defendant's statement was a spontaneous declaration of ownership of the contraband. Barnes only made a full confession after questioning by the police, although the police claim that he made the statement, "I know you smell the marijuana because I do," during detention but before questioning.

It is significant that the District Court found the detention to be illegal because Carter did not have a particu-

larized and objective basis for suspecting Barnes of criminal activity, recognizing that a voluntary confession that satisfies Fifth Amendment standards is not sufficient to purge the taint of an illegal arrest. Lanier v. South Carolina, 474 U.S. 25 (1985). Because Barnes' confession to the police was derivative of the illegal detention of him by the police, and because the taint of this detention was not attenuated by any intervening circumstances, and certainly not by the Miranda warnings alone, the confession was due to be excluded.

Although counsel did not bring this constitutional defect to the Court's attention by a specific objection on constitutional grounds, he did make the Court aware of the derivative nature of the confession in violation of the Fourth and Fifth Amendments. (Pet., p.

20). In this case, the Court should recognize this error to prevent a miscarriage of justice. United States v. Frady, 456 U.S. 152 (1982). Moreover, this case does not prevent the typical plain error claim, where no showing was made by counsel to the Court by way of contemperaneous objection of a constitutional defect. The Court was certainly aware that the detention was unlawful, and counsel made the Court aware of this by stating, "I think his statement comes because he was illegally stopped and his truck searched, and as a result of that attempt he had been doing that morning, cooperating, he continued to cooperate later with Mr. Luker." (Pet., p. 21).

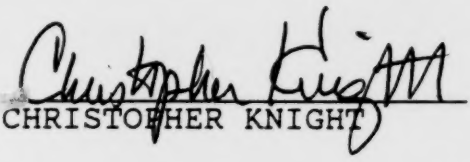
II.

REPLY TO PARAGRAPH 3 OF THE GOVERNMENT'S MEMORANDUM IN OPPOSITION.

The Petitioner submits that his "testimony" at the non-jury trial was, in fact, the very statment he made out-of-court to Deputy Luker upon which the Court based its judgment of conviction. (Pet., p. 16). This very admission cannot be used to bolster the admission under Opper v. United States, 348 U.S. 84 (1954); and Smith v. United States, 348 U.S. 147 (1954). Furthermore, petitioner did not elect not to object to the admission of his confession into evidence at the trial on the merits, but instead directed the Court's attention to the fact that the confession was derivative of the illegal search and detention. The reject should also reject the Government's contention that

evidence excluded on constitutional grounds can, nevertheless, be used to corroborate a confession. Certainly, the trier of fact is not allowed to consider such evidence in the Government's care-in-chief for any purpose.

Respectfully Submitted,



CHRISTOPHER KNIGHT

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the bar of this Court, do hereby certify that I have served a true and correct copy of this Reply Brief on Honorable Charles Fried, Solicitor General of the United States, by depositing three (3) copies of same in the United States mail at the United States Post Office at 250 Saint Joseph Street, Mobile, Alabama 36602, at approximately 2:00 P.M. on this 16th day of February, 1987, with sufficient postage affixed thereon to insure first class delivery.

Christopher Knight

CHRISTOPHER KNIGHT